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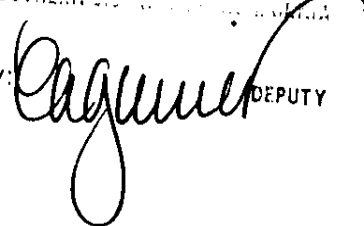
3:00-CV-00627 PARK-LINCOLN V. COASTAL SALES ASSOC

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BY:  DEPUTY

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA

PARK-LINCOLN & CROYLE
MARKETING, INC., for itself and successor
in interest to Marketing Madness, Inc., et al,

Plaintiff,

vs.

COSTAL SALES ASSOCIATES, INC.,
d/b/a Coordinated Strategic Alliances, Inc., et
al.,

Defendant.

-and-

JOSEPH CROYLE and LAR PARK
LINCOLN,

Additional Defendants
on the Counterclaim.

CASE NO. 00-CV-627 H (CGA)

**Order Denying Objections to and
Appeal from Order Denying *Ex
Parte* Application to Compel
Discovery**

On March 28, 2000, Costal Sales Associates ("Coastal Sales") filed an *ex parte* application for an order to compel discovery from non-party witnesses Deanna Roegner ("Roegner") and William Kennington ("Kennington"). Roegner and Kennington are Nevada residents. The discovery relates to an underlying action pending in the Southern District of New York. On April 18, 2000, Magistrate Judge Cynthia G. Aaron issued an order denying the application. On April 25, 2000, Coastal Sales filed an objection to and appeal from the order denying the application to compel discovery.

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BACKGROUND

Coastal Sales, International Strategic Alliances, Inc., and Retail Strategic Alliances, Inc., are defendants (“defendants” collectively) to an underlying action pending in the Southern District of New York. These defendants caused a subpoena *ad testificandum* to issue which ordered Roegner and Kennington, wife and husband respectively, to appear and testify at a deposition for the underlying New York action. Depositions were scheduled on February 22, 2000, and the defendants deposed Roegner but not Kennington.

Kennington is an employee of a Nevada corporation owned by Roegner called Family Visions, Inc. (“Family Visions”). Family Visions holds patent and trademark rights on travel kits known as the Freedom Bag and various derivative products known as the Freedom Line. Family Visions granted a license to the defendants to market its products and then terminated those licenses in June of 1999. The defendants then filed a claim against Family Visions in a separate prior action in the Southern District of New York. The parties settled in that action and as a result, Family Visions issued new licenses to the defendants. The plaintiffs then filed the current action in the Southern District of New York claiming that they are entitled to money for the sales of Freedom Line products by the defendants.

During Kennington’s deposition, Robert Vort, the attorney for Coastal Sales, asked Kennington questions about conversations that he had with his wife concerning Family Vision’s relationship with the parties in the underlying action. Kennington’s objection was raised in response to the question, “Did Deanna [Roegner] ever tell you that she had signed any pieces of paper prepared by Thane?” (Judge Aaron’s Order at 8). Kennington’s counsel advised him not to answer the question and to invoke Nevada’s spousal privileges. Nev. Rev. Stat. § 49.295(1) (1999).

In response, the defendants filed an application for an order to compel discovery with Magistrate Judge Cynthia G. Aaron. This application was denied and now the Coastal Sales objects to and appeals Judge Aaron’s order pursuant to 28 U.S.C. section 636(b)(1). Coastal Sales objects to Judge Aaron’s order only to the extent that it “rules that Kennington and Roegner may assert the marital communication privilege as to ordinary business transactions.” (Objections to and Appeal from Order at 5).

DISCUSSION

I. Choice of Law Analysis

Because this action comes before this Court under true diversity jurisdiction, state law governs claims of privilege. See Liew v. Breen, 640 F.2d 1046, 1049 (9th Cir. 1981). The Court must then determine which state's law of privilege to apply. Because the present application was filed in the Southern District of California, the Court will follow California choice of law analysis. See Klaxon Co. V. Stentor Electric Manufacturing Co., 313 U.S. 487 (1941). California's choice of law analysis is a two-prong test which focuses on the "governmental interest" of each state involved. See Waggoner v. Snow, 991 F.2d 1501, 1506 (9th Cir. 1993) (citing Demham v. Farmers Ins. Co., 213 Cal. App. 3d 1061, 1065 (1989)). First, the Court must determine whether a true conflict exists between the laws of the different jurisdictions. See Waggoner, 991 F.2d at 1506. A conflict exists if the laws of the jurisdictions differ and each state has a legitimate interest in having their law apply. See id. Once the Court determines that a true conflict exists, the Court must apply the law of the state whose interest would be more impaired if its law is not applied. See id. at 1507.

In this case, the Court must consider the law of New York, the forum state of the underlying action; Nevada, the state which issued the subpoena for Kennington and Roegner and the state in which they are citizens; and California, the state in which the application to compel discovery was filed and where the depositions of Kennington and Roegner have taken place or will take place. Because each state recognizes the spousal privilege, there is no true conflict between the different states. See N.Y.C.P.L.R. § 4502(b) (McKinney 1999); Cal. Evid. Code § 980 (West 1999); Nev. Rev. Stat. § 49.295 (1999). The only difference is that Nevada's spousal privilege protects *any* communications made during marriage whereas the spousal privilege in the other two states protects *confidential* communications only.

As noted by Magistrate Judge Aaron, Kennington and Roegner, the individuals invoking the privilege advocate the use of the less protective California rule and the depositions are scheduled to take place in California. Consequently, the Court will apply California law in this matter.¹

¹ While Coastal Sales objected to Magistrate Judge Aaron's interpretation of California law, Coastal sales did not object to the decision to apply California law.

1 **II. Spousal Privilege Analysis**

2 The Court will review the objections issued by Coastal Sales to determine if any errors were
3 made in Magistrate Judge Aaron's order. Under California law, "a spouse . . . has a privilege during
4 the marital relationship and afterwards to refuse to disclose, and to prevent another from disclosing,
5 a communication if he claims the privilege and the communication was made in confidence . . . while
6 they were husband and wife." Cal. Evid. Code § 980.

7 There is no dispute concerning whether the communication at issue was made while Roegner
8 and Kennington were married. Therefore, in order to challenge the privilege, Coastal Sales must make
9 a showing that the communication was not intended to be confidential. Coastal Sales bears the burden
10 of proof of establishing that the communication was not intended to be confidential. Cal. Evid. Code
11 § 917 ("the [spousal] communication is presumed to have been made in confidence and the opponent
12 of the claim of privilege has the burden of proof to establish that the communication was not
13 confidential").

14 Roegner and Kennington both maintain that the communications at issue were made "in private
15 and were intended to be kept confidential." (Opposition to Original Application for Order to Compel
16 at 4). Roegner and Kennington further contend that "[a]t no time were these communications ever
17 meant for another person and at no time were these communications anything but confidential
18 communications between themselves." (*Id.* at 2).

19 Consequently, Coastal Sales must show that the communications were not intended to be
20 confidential. However, Coastal Sales has presented no evidence indicating that the communication
21 at issue in this matter was not made in confidential circumstances. Instead, Coastal Sales has
22 presented law from jurisdictions other than California advocating the rule that certain business
23 transactions should be excluded from the spousal privilege.

24 Additionally, Judge Aaron's order does not prevent Coastal Sales from gathering discovery
25 about the underlying transactions between Roegner and Kennington. The order precluded the asking
26 of the specific question of whether Roegner told Kennington that she signed any pieces of paper
27 prepared by Thane. The order does not preclude questions concerning the underlying facts. For
28 example, Coastal Sales is free to ask Kennington whether Roegner did, in fact, sign documents

1 prepared by Thane as long as they do not frame the question in terms of what Roegner *told*
2 Kennington.

3 Moreover, Coastal Sales can depose Roegner, which they have not yet done, and they are free
4 to ask Roegner herself whether or not she signed documents prepared by Thane as long as no other
5 evidentiary or privilege rules bar the questions. By deposing Roegner, Coastal Sales would be able
6 to obtain the facts concerning the transaction between Roegner and Thane directly from Roegner
7 instead of indirectly from Kennington. Coastal Sales would also be able to obtain facts, if any exist,
8 from Roegner which might indicate that the communication at issue between Roegner and Kennington
9 was not intended to be confidential. For example, if Coastal Sales discovered that the communication
10 was made in the presence of others, that might rebut the presumption that the communication was
11 confidential.

12 Because Coastal Sales has not satisfied their burden of showing that the communication
13 between Roegner and Kennington was not confidential, the Court DENIES the objections to and
14 appeal from the order issued by Judge Cynthia G. Aaron on April 18, 2000, without prejudice. Coastal
15 Sales may renew their objection and appeal if they obtain sufficient evidence to show that the
16 communication at issue was not intended to be confidential.

17 **III. Failure to Consider the Law of Other Jurisdictions**

18 Coastal Sales also objects to Magistrate Judge Aaron's purported "fail[ure] to discuss [and]
19 consider relevant case authority on point from other states . . . which have similarly-worded marital
20 communications privilege statutes." (Objections to and Appeal from Order at 3). Coastal Sales further
21 contends that these states have held that the spousal privilege does not apply to communications
22 involving ordinary business transactions.

23 Magistrate Judge Aaron explicitly considered the spousal privilege statutes of New York,
24 California and Nevada in her choice of law analysis. She did not explicitly analyze the case law from
25 other jurisdictions concerning whether the privilege applies to ordinary business transactions.

26 However, the lack of any discussion concerning the case law of other jurisdictions does not
27 necessarily indicate that Magistrate Judge Aaron did not consider the case law from other jurisdictions.

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1 Furthermore, a court applying California law is not bound by the case law of other jurisdictions when
2 interpreting California statutes.

3 **CONCLUSION**

4 The objection to and appeal from the order issued by Judge Cynthia G. Aaron on April 18,
5 2000, is DENIED without prejudice.

6 IT IS SO ORDERED.

7 DATED: 5-1-00

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9 MARILYN L. HUFF, CHIEF JUDGE
10 UNITED STATES DISTRICT COURT
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28 Magistrate Judge Cynthia G. Aaron**